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No. 88-1767 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

IN RE SAVE YONKERS FEDERATION, INC., ET AL., PETITIONERS

v.

LEONARD B. SAND, UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying a petition for an original writ of prohibition to stop the district court's implementation of comprehensive remedial orders entered in an action brought by the United States and private plaintiffs against the City of Yonkers.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1989. A petition for rehearing was denied on February 23, 1989 (Pet. App. 1b). The petition for a writ of certiorari was filed on April 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a lengthy trial, the United States District Court for the Southern District of New York issued a decision in November 1985, holding the City of Yonkers (City) liable for a pattern and practice of intentional racial discrimination in the selection of sites for public and subsidized housing, in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq. United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985).[1] The court found that the City had deliberately concentrated virtually all of its public and subsidized housing in the southwest quadrant of Yonkers in order to maintain racial segregation. In sum, the court found that "for more than thirty years, the site selection process for subsidized housing was dominated by the unwillingness of the [Yonkers] City Council to approve or support a site in the face of community opposition," and that such opposition was motivated in sig-

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[1] This Court, having considered on several occasions petitions for a writ of certiorari, is familiar with the procedural and factual background of the litigation between the United States and the City of Yonkers, New York, which began in December 1980. See *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986), aff'd, 837 F.2d 1181 (2d Cir. 1987), certs. denied, 108 S. Ct. 2821 (1988); *United States* v. *City of Yonkers*, 856 F.2d 445 (2d Cir. 1988), cert. granted, 109 S. Ct. 1337 (Nos. 88-854, 88-856, and 88-870), cert. denied, 109 S. Ct. 1339 (1989) (No. 88-855); *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), cert. denied, 109 S. Ct. 1527 (1989). We have previously submitted detailed accounts of the history of this litigation. See, *e.g.*, U.S. Br. in Opp. 2-10, *Spallone* v. *United States*, Nos. 88-854, 88-855, 88-856, and 88-870; U.S Br. in Opp. 2-7, *Yonkers Bd. of Educ.* v. *United States*, Nos. 87-1632 and 87-1686. Accordingly, we present here an abbreviated statement of the case.

nificant part by "the desire to preserve existing patterns of segregation." *Id.* at 1371.[2]

Following remedial proceedings, on May 28, 1986, the district court entered its "Housing Remedy Order," requiring the City of Yonkers and the Yonkers City Council to take a number of actions designed to facilitate the development of public and subsidized housing outside Southwest Yonkers. *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986). Part IV of the Order specifically required the City to designate 200 units of public housing in East Yonkers. See *id.* at 1580-1581. Part VI of the Order required the City, by November 1986, to develop and implement a plan, known as the Long Term Plan, for the creation of assisted housing, other than public housing, outside Southwest Yonkers. See *id.* at 1582. The district court declined to set a goal for the number of housing units to be developed under the Long Term Plan, to establish a timetable for that development, or to prescribe how such housing should be provided. Instead, the court left to the City both the opportunity and the responsibility for proposing the substantive aspects of the Plan. *Ibid.*

2. The City refused to submit any proposal for the Long Term Plan, refused to designate public housing sites, and indeed took "no significant action to comply with the 1986 Housing Remedy Order" for the first year and a half after its entry. *United States* v. *City of Yonkers*, 856 F.2d 444, 448 (2d Cir. 1988). After further proceedings, and

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[2] The Yonkers Branch of the National Association for the Advancement of Colored People (NAACP) and an individual minority student, by her next friend, moved to intervene in the action as parties-plaintiff. In June 1981, the district court granted leave to intervene and later certified the action as a class action on behalf of black residents of Yonkers. See *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1288 n.1 (S.D.N.Y. 1985).

after the court of appeals had affirmed the district court's liability and remedy orders, the parties negotiated a consent decree setting forth the actions the City would take to comply with Part IV (public housing) and Part VI (Long Term Plan) of the Housing Remedy Order. The Yonkers City Council approved the consent decree on January 27, 1988. The district court entered the decree as a consent judgment on January 28, 1988. *Ibid.* The consent decree renewed the City's commitment to build the first 200 units of public housing and identified seven specific sites. In addition, the consent decree established a goal of 800 additional units of housing and committed the City to enact certain legislation to facilitate that goal. *Id.* at 448-449.

The City continued to resist complying with its commitments, most recently embodied in the consent decree. On June 13, 1988, the district court ultimately entered its Long Term Plan Order. *City of Yonkers,* 856 F.2d at 449. By the end of June, however, it became clear that the City, acting through the City Council, would not comply with the consent decree and would not voluntarily adopt the legislation necessary to implement the Long Term Plan. As a result, in early August, the district court held the City and four individual members of the Yonkers City Council in civil contempt. *Id.* at 450-452. On August 26, the court of appeals unanimously upheld the court's imposition of contempt sanctions.[3]

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[3] Both the City and the individual Council members sought certiorari to review the court of appeals' decision. On March 6, 1989, this Court denied the City's petition, 109 S. Ct. 1339 (No. 88-855), and granted the Council members' petitions, 109 S. Ct. 1337 (Nos. 88-854, 88-856, and 88-870). The latter petitions raise several issues concerning federal court authority to impose sanctions against individual local legislators for refusing to comply with court orders, including a directive to enact specific legislation. Petitioners here raise a single, unrelated issue concerning the district court's entry of the original Hous-

3. On November 21, 1988, petitioners requested an original writ of prohibition in the court of appeals against United States District Judge Leonard B. Sand, the federal judge presiding over the *Yonkers* litigation.[4] Petitioners sought the writ to bar the district court from implementing its remedial orders entered in that action. Petitioners principally contended that the district court's Housing Remedy Order, on its face, violates the First, Fifth, and Ninth Amendments by forcing them to associate with "low-class people (of any race) and the crime and housing rot which nearly always accompanies their presence," and by diminishing property values and raising taxes without due process of law. Pet. for Writ of Prohibition at xv. In addition, petitioners claimed that the Housing Remedy Order, together with the district court's later orders, including the consent decree and the Long Term Plan, exceeded the court's jurisdiction under 42 U.S.C. 3613,[5] and violated the Tenth Amendment and the doctrine of separation of powers. Pet. for Writ of Prohibition at xxxvii-xlvii.

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ing Remedy Order. See Pet. i. Accordingly, the Court's disposition in Nos. 88-854, 88-856, and 88-870 will have no bearing on the issue petitioners present.

[4] Petitioner Save Yonkers Federation, Inc., purports to represent "its member associations, including but not limited to local civic, neighborhood and taxpayer groups." Pet. for Writ of Prohibition at xv. Eighteen groups of individuals identified as property owners, renters, and taxpayers in the City joined the Federation's motion for a writ of prohibition. See *id.* at xv-xix.

[5] Section 3613 provides in pertinent part:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Fair Housing Act], or that any group of persons has been denied any of the rights granted by [the Fair Housing Act] and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts

4. On January 6, 1989, the court of appeals summarily denied the petition for a writ of prohibition in a one-sentence unpublished order (Pet. App. 1a).

ARGUMENT

1. This Court has made clear that "[a writ of] [p]rohibition is a remedy of exigency." *Ex parte United States,* 263 U.S. 389, 392-393 (1923). As with other extraordinary writs, courts of appeals traditionally have resorted to the issuance of a writ of prohibition to preserve their own jurisdiction, or, upon a party's motion, to confine a lower court to the "lawful exercise of its prescribed jurisdiction." *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, 26 (1943); see *Ex parte Chicago, R.I. & Pac. Ry.,* 255 U.S. 273, 275-276 (1921); cf. *United States* v. *Mayer,* 235 U.S. 55 (1914) (court of appeals may issue extraordinary writ to prevent the district court from vacating criminal convictions that were pending on appeal). On the other hand, the writ of prohibition will not issue where "the complaining party has an adequate remedy by appeal or otherwise," *Ex parte Chicago, R.I. & Pac. Ry.,* 255 U.S. at 275.

In this case, petitioners sought a writ of prohibition directly from the court of appeals to challenge the merits of remedial orders entered by the district court in an action in which petitioners had not participated, as either parties or intervenors. Petitioners do not even claim that they

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and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible * * *.

Section 3613 has recently been amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 8(2), 102 Stat. 1633-1635, legislation that has broadened the enforcement authority of the Attorney General and the United States Department of Housing and Urban Development under the Fair Housing Act.

sought to challenge the district court's orders in that court, by moving to intervene, by participating as amici curiae, or by taking any other action. Under these circumstances, a writ of prohibition is plainly inappropriate. Indeed, we are aware of no authority under 28 U.S.C. 1651, this Court's precedents, or the common law, and petitioners cite none, that would support the issuance of a writ of prohibition in these circumstances. Accordingly, the court of appeals properly denied petitioners' request for extraordinary relief.

2. In any event, petitioners' substantive challenge to the district court's remedial orders is groundless. Petitioners essentially contend (Pet. 4-9) that the Attorney General's specific statutory authority in 42 U.S.C. 3613 to file actions on behalf of the United States under the Fair Housing Act limits the district court's remedial powers. Even if this case presented that issue,[6] petitioners themselves acknowledge (Pet. 8-9) that no federal court has construed Section 3613 as circumscribing the exercise of traditional equitable powers. On the contrary, federal courts have used such powers to grant affirmative injunctive relief in appropriate cases under the Fair Housing Act. See, *e.g.*, *United States* v. *City of Parma,* 661 F.2d 562, 576-578 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982). Accordingly, the issue petitioners seek to raise clearly does not warrant further review.

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[6] This case does not present the issue petitioners raise since the underlying action against the City was not brought exclusively by the Attorney General under the Fair Housing Act. Instead, that action also raised substantial claims under the Equal Protection Clause of the Fourteenth Amendment, and the intervening class plaintiffs raised claims under the Civil Rights Act of 1871, 42 U.S.C. 1981 and 1983. See *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1292 n.10 (S.D.N.Y. 1985); note 2, *supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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